

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SHAWN M. DAVIS, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

NAVIENT CORPORATION, et al.

Defendants.

17-CV-0992
Order Adopting Report and
Recommendation

On October 3, 2017, the plaintiff, Shawn Davis, commenced this action raising claims for breach of contract, tortious interference with contract, and breach of the covenant of good faith. Docket Item 1. On December 5, 2017, this Court referred the case to United States Magistrate Judge Jeremiah J. McCarthy for all proceedings under 28 U.S.C. § 636(b)(1)(A) and (B). Docket Item 16. On November 22, 2017, the defendants moved to dismiss the complaint or, in the alternative, to strike class allegations, Docket Item 13; on January 12, 2018, Davis responded, Docket Item 18; and on February 1, 2018, the defendants replied, Docket Item 23. On March 12, 2018, Judge McCarthy issued a Report and Recommendation (“R&R”) finding that the defendants' motion should be granted in part and denied in part. Docket Item 25. Judge McCarthy recommended that the complaint be dismissed with leave to replead and that the motion to strike the class allegations therefore be denied as moot. *Id.*

On July 2, 2018, Davis filed an objection to the R&R, but he did not object to the relief Judge McCarthy recommended; instead, he argued that if this Court does not dismiss the complaint as Judge McCarthy recommended, it should not strike the class

allegations. Docket Item 33. He asked that this Court dismiss with leave to replead and order the defendants to identify which Navient subsidiary was the lender on his loans.

Id. at 2. On July 24, 2018, the defendants responded to the objections, asking the Court to dismiss with prejudice. Docket Item 35. On August 7, 2018, Davis replied. Docket Item 36.

A district court may accept, reject, or modify the findings or recommendations of a magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). A district court must conduct a de novo review of those portions of a magistrate judge's recommendation to which objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

This Court has reviewed the careful and thorough R&R; the record in this case; the objection, response, and reply; and the pleadings and materials submitted by the parties. Based on that review, the Court accepts and adopts Judge McCarthy's recommendation in its entirety.

For the reasons stated by Judge McCarthy, dismissal without prejudice is the appropriate remedy. The defendants' failure to timely object to the R&R waived review of that issue. See *Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003). And even if the defendants had objected, Judge McCarthy's recommendation is substantively correct.

Moreover, an objection to a report and recommendation issued on a motion to dismiss is not an appropriate vehicle for the plaintiff's request for a discovery order. See *Bryant v. Silverman*, 2018 WL 4357478, at *2 (S.D.N.Y. Sep. 12, 2018); *In re Gushlak*, 2012 WL 3683530, at *1 n.1 (E.D.N.Y. Aug. 24, 2012). In fact, given that this Court is dismissing the case without prejudice, it may well not have jurisdiction to issue

the relief that the plaintiff requests. *Cf. Teamsters Local 404 Health Servs. & Ins. Plan v. King Pharms., Inc.*, 906 F.3d 260 (2d Cir. 2018).

For the reasons stated above and in the R&R, the defendants' motion to dismiss, Docket Item 13, is GRANTED in part; the defendants' motion to strike class allegations, *id.*, is DENIED as moot; and the complaint, Docket Item 1, is dismissed without prejudice. The plaintiff may file an amended complaint within 30 days of the date of, and consistent with, this order and the R&R. If the plaintiff files an amended complaint, the case will be referred to Judge McCarthy, without further order of this Court, for further proceedings consistent with the referral order of December 5, 2017. If the plaintiff does not file an amended complaint within 30 days of this order, the Clerk of the Court shall close the file.

SO ORDERED.

Dated: January 29, 2019
Buffalo, New York

s/ Lawrence J. Vilardo
LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE